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In the Supreme Court of the United States

ROBERT R. KRILICH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Federal Water Pollution Control Act Amendments of 1972, as amended (Clean Water Act or CWA), prohibits the discharge of pollutants into "navigable waters," defined by the Act as "waters of the United States," except in conformity with the Act. See 33 U.S.C. 1311(a), 1362(7), 1362(12)(A). Petitioners entered into a consent decree in which they agreed to treat as "waters of the United States," within the meaning of the CWA, certain wetland and open water areas into which the Environmental Protection Agency alleged that they had illegally discharged pollutants. Petitioners also agreed to restore some of those areas and to create mitigation wetland and open water areas, all pursuant to a stipulated schedule. When petitioners failed to fulfill their obligations under the consent decree, the district court assessed a monetary penalty pursuant to the terms of the decree. Petitioners subsequently moved to vacate the money judgment on the ground that the pertinent waters were not in fact subject to federal regulatory authority. The question presented is as follows:

Whether the district court abused its discretion by denying petitioners' motion to vacate the earlier money judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 209 F.3d 968. The opinion of the district court (Pet. App. 11a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2000. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including August 10, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500,

86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* (Clean Water Act or CWA), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The CWA prohibits the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The Act provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

Discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404 of the CWA, 33 U.S.C. 1344. The Corps has issued regulations that define the term "waters of the United States" to include, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3). The Environmental Protection Agency (EPA) has promulgated regulations that include a substantially identical definition of the term "waters of the United States." See 40 C.F.R. 230.3(s)(3), 232.2.

2. a. In August 1992, the EPA filed a complaint in federal district court, alleging that petitioners had unlawfully discharged fill material into wetlands without obtaining a Section 404 permit. In October 1992, the district court entered final judgment pursuant to the terms of a consent decree negotiated by the parties. Under the consent decree, petitioners agreed

to pay a civil penalty of $185,000, to restore portions of the damaged wetlands, and to construct new wetlands to compensate for wetlands that had been filled. The consent decree specified the times during which the petitioners' remediation and new construction were to be completed, and it provided for monetary penalties in the event that petitioners failed to meet the deadlines. Pet. App. 1a, 4a, 12a, 14a.

b. Petitioners failed to meet the deadline for completion of the new wetlands, and the United States moved to enforce the terms of the consent decree. Pet. App. 1a, 5a, 11a-12a. The district court held that petitioners had violated the terms of the consent decree and were required to pay a penalty of $1,307,500. See *United States* v. *Krilich* (*Krilich I*), 948 F. Supp. 719, 728 (N.D. Ill. 1996); see also Pet. App. 1a, 12a. The court of appeals generally affirmed the district court's decision but remanded the case to allow the district court to correct an error in calculating the penalty. See *United States* v. *Krilich*, 126 F.3d 1035 (7th Cir. 1997). On December 15, 1997, the district court entered a modified judgment in the amount of $1,257,500. See Pet. App. 12a.

3. On November 2, 1998, petitioners filed a motion to bar enforcement of the penalty. Pet. App. 1a-2a, 12a. Petitioners contended that the district court in *Krilich I* lacked jurisdiction to enforce the deadlines contained in the consent decree "because the land that allegedly was improperly filled did not constitute a wetland under the CWA or did not have a sufficient connection with interstate commerce in order to invoke federal jurisdiction." *Id.* at 12a. The district court held that petitioners were not entitled to relief under Federal Rule of Civil Procedure 60(b)(4) or (5).

a. Rule 60(b)(4) provides that "upon such terms as are just," a federal district court may "relieve a party or a party's legal representative from a final judgment, order, or proceeding" where "the judgment is void." Fed. R. Civ. P. 60(b)(4). The district court accepted petitioners' contention that their challenge to EPA's assertion of regulatory authority went to the subject matter jurisdiction of the court. Pet. App. 14a-15a. The court held, however, that a final judgment should not be overturned based on an alleged jurisdictional defect "unless the jurisdictional error is egregious." *Id.* at 13a (quoting *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)). The court concluded that, whether or not the waters at issue in this case were in fact covered by the CWA, "[t]here was and continues to be a colorable basis for exercising jurisdiction over the [waters] and it cannot be held that jurisdiction in this case was totally wanting." *Id.* at 16a.[1]

b. Petitioners contended that the consent decree "should be vacated in light of a change in the law represented by" *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Wilson*, 133 F.3d 251 (4th

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[1] The court explained:

> The jurisdictional issue that is now raised could have been raised by [petitioners] at the time *Krilich I* was being litigated. More importantly, there is nothing in the Decree nor any other pleadings filed prior to [petitioners'] present motion that makes it apparent that the mitigation plan may have been based solely on the filling of isolated wetlands. Neither was there any information indicating that those wetlands' only possible connection to interstate commerce was their occasional use by migratory birds. Moreover, both presently and in 1996, precedent in this circuit supports that isolated wetlands are a sufficient basis for CWA regulation.

Pet. App. 15a-16a (footnote omitted).

Cir. 1997). Pet. App. 16a. The district court recognized that "pursuant to Fed. R. Civ. P. 60(b)(5), consent decrees may (or even must) be modified or vacated in light of changed circumstances, including significant changes in the law or factual conditions." *Id.* at 17a. The court explained, however, that "this rule is limited to relief from the prospective application of a decree" and "is not a basis for vacating or modifying a previously entered money judgment." *Ibid.* Because "vacating the Decree would not preclude the government from continuing to collect on the December 1997 judgment," the court found it "unnecessary to reach the merits of whether the Decree should be vacated in light of alleged changes in the law." *Id.* at 17a, 18a.

4. The court of appeals affirmed. Pet. App. 1a-10a. The court explained that although proof of a constitutionally sufficient link to interstate commerce is sometimes described as the "jurisdictional element" of a federal statute, the existence of such a link does not go to the subject matter jurisdiction of the court in which suit is brought. *Id.* at 6a-8a. Rather, the court held, proof of the requisite interstate commerce nexus is an element of the substantive offense, and the absence of such proof does not deprive the court of jurisdiction under 28 U.S.C. 1331. Pet. App. 8a. The court of appeals also explained that, even if the alleged defect in the government's CWA complaint were properly characterized as jurisdictional, petitioners "cannot now assail the district court's subject matter jurisdiction because [they] entered into a consent decree in which [they] agreed that the waters involved were 'waters of the United States.'" *Ibid.* The court of appeals concluded that "[b]ecause the district court had subject matter jurisdiction over the EPA's complaint based on the terms of the consent decree, we need not determine

whether * * * regulation of isolated intrastate wetlands is beyond Congress' power under the Commerce Clause." *Id.* at 10a n.5.

5. On January 18, 2000, petitioners deposited funds in the amount of $1.5 million with the clerk of the district court. As of this filing, the penalty amount has not yet been paid to the United States.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted. There is also no meaningful likelihood that the Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178 (to be argued October 31, 2000), will affect the proper disposition of the instant case.

1. The bulk of the petition is devoted to the question "whether the EPA may regulate isolated, intrastate waters, consistent with the limits on EPA's regulatory authority inherent in the Clean Water Act and the Commerce Clause." Pet. 8. Petitioners note that the Court has granted certiorari to resolve that question in *Solid Waste Agency*, and they assert that "[t]his Court's decision in *Solid Waste* likely will affect the proper disposition of this case." Pet. 15. That claim is incorrect.

The court of appeals stated that "[b]ecause the district court had subject matter jurisdiction over the EPA's complaint based on the terms of the consent decree, we need not determine whether * * * regulation of isolated intrastate wetlands is beyond Congress' power under the Commerce Clause." Pet. App. 10a; see Pet. 8 (noting that the court of appeals "refused to reach" the question whether the EPA's regulatory

authority extends to intrastate isolated waters). The court of appeals thus made clear that in its view, petitioners would not be entitled to relief from the money judgment entered in *Krilich I* even if they could establish that the EPA lacked regulatory authority over the waters in question. There is consequently no meaningful likelihood that this Court's decision in *Solid Waste Agency* will affect the disposition of the instant case.

2. In order to obtain their desired relief, petitioners must establish (in addition to the claimed impropriety of EPA's assertion of regulatory authority here) that a district court abuses its discretion by failing to vacate an unpaid money judgment where the defendant shows that the underlying suit was premised on an unconstitutional application of the statute under which the claim arose. That remedial issue, however, is not fairly included within the question presented. See Pet. i. Moreover, petitioners have identified no authority supporting their position on the remedial question, and they make no effort to explain why the question warrants this Court's review. In any event, the claim lacks merit.

a. The CWA states that "[t]he Administrator [of EPA] is authorized to commence a civil action for appropriate relief" under the Act, and it provides that any such action "may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance." 33 U.S.C. 1319(b). In addition, 28 U.S.C. 1331 vests the federal district courts with jurisdiction over actions arising under federal law. Had petitioners chosen to contest the government's allegations rather than entering into a consent decree, they could have obtained a judicial ruling on the

question whether the relevant waters were properly subject (under the CWA and the Commerce Clause) to the EPA's regulatory authority. If petitioners had challenged the EPA's assertion of regulatory authority over the wetlands, the case would have proceeded to discovery and ultimately to factfinding regarding the physical characteristics of the wetlands and their connection to interstate commerce. But even if petitioners had obtained a favorable decision on their Commerce Clause argument, the consequence would have been dismissal of the government's suit on the merits, not for lack of jurisdiction. Cf. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) ("none would suggest that a litigant may never waive the defense that a statute is unconstitutional"); *United States* v. *Baucum*, 80 F.3d 539, 541 & n.2 (D.C. Cir.) (explaining that the weight of authority in the courts of appeals holds that a constitutional challenge to the statute under which a criminal defendant has been convicted may be waived through failure to assert it in a timely fashion), cert. denied, 519 U.S. 879 (1996).

Petitioners rely (Pet. 9) on three cases holding or suggesting that the facial invalidity of a federal criminal statute deprives the district court of jurisdiction in a prosecution brought under the invalid law. Those cases are contrary to the great weight of current authority. See *Baucum*, 80 F.3d at 541 & n.2. But in any event, petitioners do not contend that the CWA is "void" in its entirety; they simply argue that the Act cannot constitutionally be applied to isolated intrastate waters. Petitioners cite no precedent suggesting that an as-applied constitutional challenge to the government's enforcement of a facially valid statute calls into question the jurisdiction of the court in which the suit is brought.

b. Even if petitioners' challenge to the underlying enforcement action were properly characterized as "jurisdictional," they would not be entitled to the relief they seek. Fed. R. Civ. P. 60(b) provides that under specified circumstances, the court "may" relieve a party from a final judgment "upon such terms as are just." "Rule 60(b), which authorizes discretionary judicial revision of judgments * * *, does not impose any legislative mandate to reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power * * * to set aside a judgment whose enforcement would work inequity." *Plaut*, 514 U.S. at 233-234.

Petitioners identify no authority suggesting that Rule 60(b) requires vacatur of a final judgment whenever the court that entered the earlier decree is shown to have been without jurisdiction to act.[2] Nor is there merit to petitioners' suggestion (Pet. 9) that because challenges to a federal court's subject matter jurisdiction are "never waived," the judgment of a court that lacked jurisdiction may properly be treated as a

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[2] The district court observed that "there is nothing in the [Consent] Decree nor any other pleadings filed prior to [petitioners'] present motion that makes it apparent that the mitigation plan may have been based solely on the filling of isolated wetlands." Pet. App. 15a. The court noted as well that "[t]he government disputes [petitioners'] present contentions that the only basis for these wetlands falling into the purview of the CWA is as isolated wetlands that are visited by migratory birds." *Id.* at 16a n.5. Under petitioners' theory, the district court was required to conduct a potentially time-consuming inquiry into the physical characteristics of the relevant waters, notwithstanding petitioners' prior decision to enter into a negotiated consent decree rather than contest EPA's assertion of regulatory authority. Presumably the settlement agreement involved mutual concessions, the advantages of which petitioners do not offer to relinquish.

nullity.[3] To the contrary, this Court has recognized that a final judicial decree retains operative legal significance even if intervening decisions make clear that the court lacked jurisdiction.

In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 373-378 (1940), the Court held that a final judgment in an earlier proceeding should be given *res judicata* effect, despite the fact that the jurisdictional statute under which the earlier court had acted had since been declared unconstitutional. The Court explained that where jurisdiction is contested in an initial proceeding, "[t]he court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action." *Id.* at 377. The Court concluded that the same rule should apply where the defendant did not dispute the district court's jurisdiction in the earlier suit:

> The remaining question is simply whether respondents, having failed to raise the [jurisdictional] question in the proceeding to which they were

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[3] As the court of appeals held in *In re Edwards*, 962 F.2d 641 (7th Cir. 1992), a judgment is not "void" within the meaning of Rule 60(b)(4) simply because the court that entered it lacked subject matter jurisdiction. 962 F.2d at 644. The court explained:

> Want of subject-matter jurisdiction is not waivable—until the loser has exhausted his appellate remedies, after which courts will not treat the judgment as void unless the jurisdictional error is egregious * * *. If it is not egregious, the courts say that the court that issued the judgment in excess of its jurisdiction had jurisdiction to determine jurisdiction, and its jurisdictional finding, even if erroneous, is therefore good against collateral attack, like any other erroneous but final judgment.

Ibid. (citing cases).

> parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any other available matter which might have been presented to that end.

Id. at 378 (internal quotation marks omitted); see also *Baucum*, 80 F.3d at 541 (discussing *Chicot County Drainage District*).

Thus, even if the 1992 consent decree were shown to have been premised on an erroneous view of the scope of EPA's regulatory authority, and even if that error were properly regarded as bearing on the subject matter jurisdiction of the court that entered the decree, petitioners would not be entitled to vacatur of the money judgment entered in *Krilich I*. Petitioners chose to settle the claims against them rather than to contest EPA's assertion of regulatory authority over the waters on their property. Neither the consent decree itself nor the subsequent money judgment is subject to collateral attack based on petitioners' belated contention that the district court lacked jurisdiction over the suit. Indeed, petitioners' request for vacatur of the money judgment is especially ill-considered because petitioners waived their constitutional challenge *twice*—once by entering into a consent decree that settled the CWA claims against them, and again by failing to raise the issue as a defense to the government's action for penalties in *Krilich I*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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